FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-1560

LATISHA A. GRADIA, individually, and LATISHA A. GRADIA, as Next Friend of BXG and BNG, minor children,

Appellants,

v.

BAPTIST HOSPITAL, INC.,

Appellee.

On appeal from the Circuit Court for Santa Rosa County. Darlene F. Dickey, Judge.

August 10, 2022

OSTERHAUS, J.

This case involves medical negligence allegations made against Baptist Hospital, Inc., for emergency room care that allegedly caused patient Latisha Gradia to experience permanent brain damage and disability. In summary judgment proceedings below, the trial court concluded that the Hospital couldn't be held vicariously liable for the care rendered in its emergency room because an independent contractor, Pensacola Emergency Physicians, LLC (PEP), operated the emergency department and employed the physician who treated Gradia. The court granted summary judgment in favor of the Hospital on Appellants' actual

agency, apparent agency, and nondelegable duty claims. But because unresolved factual issues persist as to whether the treating physician was acting as the Hospital's agent, we reverse the order granting summary judgment on the vicarious liability claims while affirming the nondelegable duty claim.

I.

After appellant Gradia went into cardiac arrest at her home in 2021, she was transported by ambulance and arrived comatose to Santa Rosa Medical Center (SRMC). After several hours in the emergency department at SRMC, Gradia's treating physician arranged to have her transferred to Baptist Hospital in Pensacola, a Level II trauma center, because of its higher-level ability to give appropriate care. Once Gradia arrived at the Hospital (she was still comatose), the treating physician in the Hospital's emergency department decided not to induce therapeutic hypothermia. According to the Complaint, this treatment omission was a breach of the prevailing standard of care and left Gradia with permanent brain damage and complete disability. Appellants sued the Hospital alleging negligence and harm caused by the decision of its emergency department physician not to initiate therapeutic hypothermia.

The Hospital denied Appellants' allegations citing its independent-contractor agreement with the company that operated its emergency department. The Hospital's Emergency Services Agreement stated that PEP operated the Hospital's emergency department as an independent contractor with no employer/employee relationships created between the Hospital and the physicians employed by PEP. And so, according to the Hospital, only PEP and its physicians could be held responsible for negligence arising from their treatment decisions in the emergency room. The trial court agreed with the Hospital and granted summary judgment on the agency-based, vicarious liability claims, as well as on the nondelegable duty claim.

II.

This Court reviews an order granting summary judgment de novo. *See, e.g.*, *Carter Dev. of Mass., LLC v. Howard*, 285 So. 3d 367, 370 (Fla. 1st DCA 2019). In general, a hospital will not be

liable for the negligence of physician who works in the hospital as an independent contractor. *See Shands Teaching Hosp. & Clinic Inc., v. Juliana,* 863 So. 2d 343, 349 (Fla. 1st DCA 2003); *Tabraue v. Doctors Hosp., Inc.*, 272 So. 3d 468, 471 (Fla. 3d DCA 2019). Liability may attach notwithstanding a physician's independent contractor status, however, if "(1) the physician is an actual or apparent agent of the hospital; (2) a statute, regulation, or contract creates a nondelegable duty; or (3) the hospital failed to exercise due care in selecting the physician." *Tabraue v. Doctors Hosp., Inc.*, 272 So. 3d at 471 (quoting *Godwin v. Univ. of S. Fla. Bd. of Trs.*, 203 So. 3d 924, 929 (Fla. 2d DCA 2016)).

A.

To win summary judgment, Baptist Hospital had to show that there was "no genuine dispute as to any material fact and [it was] entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(a). Appellants contend that the trial court erred by granting summary judgment on the vicarious liability issues because a substantial fact dispute remains as to who controlled the work of Gradia's emergency room physician, the Hospital or the physician himself. Under agency theory, "the right of control rather than the relationship between the parties" determines whether an agency relationship exists. *Operations Mgmt. Int'l. v. Johnson*, 294 So. 3d 1005, 1007 (Fla. 1st DCA 2020). To resolve right of control issues, courts look first to the parties' written contract. *Stoll v. Noel*, 694 So. 2d 701, 703 (Fla. 1997); *Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842, 853 (Fla. 2003) ("The degree of control retained or exercised may certainly be determined by a single contract or . . . by reference to multiple writings, policies, or procedures that may be operative in addition to an underlying contract."). Independent contractors may be considered agents under certain circumstances. *Villazon*, 843 So. 2d at 853; *see also Stoll*, 694 So. 2d at 703 (recognizing that "the roles of agent and independent contractor are not mutually exclusive"). A physician's contracted status as an independent contractor does not preclude a finding of agency. *Villazon*, 843 So. 2d at 854. Summary judgment is not appropriate when "there are provisions in the contract that support the principle [of agency]." *Operations Mgmt. Int'l.,* 294 So. 3d at 1007.

In this case, Baptist Hospital's Emergency Services Agreement with PEP to operate the emergency department cuts both ways in the parties' agency dispute over the Hospital's right of control. On one hand, the Agreement states that PEP is an independent contractor and that "[n]o relationship of employer and employee is created by this agreement." It provides that PEP and not the Hospital is "responsible for the acts of its agents, employees, and subcontractors while engaged in the performance of services herein." But, on the other hand, the Agreement gives Baptist Hospital ultimate control over emergency department personnel and the methods and practices employed by emergency room physicians. Although the Agreement states that physicians provide emergency services according to their own means and methods of work, it also provides that "the overall authority and responsibility for policy, administration and executive control matters relating to the operation of the Emergency Department and the Emergency Services shall remain with the Hospital."

The Florida Supreme Court has recognized that it isn't "uncommon for parties to include conclusory statements in documents with regard to the independence of the relationship . . . even when other contractual provisions and the totality of the circumstances reflect otherwise." *Villazon*, 843 So. 2d at 853. The Agreement here repeatedly sets forth the Hospital's ultimate control over the emergency department, for instance, to "ensure that Emergency Services are provided at all times in strict accordance with currently approved methods and practices and . . . in accordance with the standards required by the Medical Staff of Hospital . . . [and] subject to Hospital's ultimate supervision and control." PEP's personnel are required to act in "compliance with the Hospital and Medical Staff Bylaws, rules, and regulations, as well as Hospital policies and procedures." As to coverage and scheduling, staffing of emergency services must be set "as required by the Hospital and its Medical Staff to meet . . . its emergency caseload in a manner and time consistent with Hospital policies." The Agreement also places final physician-hiring authority in the hands of the Hospital. It describes the hiring process in terms of PEP pre-identifying candidates but the Hospital ultimately selecting the emergency department's physicians. The Hospital also retains the "ultimate right to grant or refuse admission of a physician to membership rights." *Cf. Jones v. Tallahassee Mem'l*

Reg'l Healthcare, Inc., 923 So. 2d 1245, 1247 (Fla. 1st DCA 2006) (recognizing that merely granting staff privileges to an independent contractor physician is insufficient as a matter of law to create a jury question on apparent authority).

Beyond the Hospital's Agreement with PEP, the record also indicates that the Hospital adopted and maintained medical practices protocols or guidelines used by emergency department physicians to decide whether to induce hypothermia for neurologically compromised patients, the treatment alleged to have been withheld from Gradia. Hard copies of the Hospital's protocol were kept in the trauma rooms. And the treating physician in Gradia's case acknowledged consulting the protocol in course of determining her treatment. This protocol, which gave the Hospital a voice in the details of the physician's emergency treatment decision, lends additional support to Appellants' vicarious liability claims.

Based on the terms of the Hospital-PEP Agreement and the Hospital-protocol evidence, we conclude that a genuine dispute remains about the Hospital's supervision and right of control over the emergency treating physician, which entitles Appellants to a trial. *See Blue v. Weinert*, 284 So. 3d 1176, 1177 (Fla. 1st DCA 2019) ("Given the factual uncertainty in the record as to whether New Frontiers had the right to control painting outcomes or not, it was error to take the matter away from the jury's consideration."); *Villazon*, 843 So. 2d at 854 (quashing summary judgment where there was "significant indicia" of a health care plan's right to control how medical services were rendered by independent-contractor physicians). We thus reverse the order granting summary judgment on Appellant's actual agency claim.

In turn, genuine issues of material fact likewise persist on Appellants' apparent agency claim. The doctrine of apparent agency stems from "the policy 'that a principal should be estopped to deny the authority of an agent when the principal permitted an appearance of authority in the agent and, in so doing, justified a third party's reliance upon that appearance of authority as if it were actually conferred upon the agent.'" *Del Pilar v. DHL Global Customer Solutions (USA), Inc.*, 993 So. 2d 142, 147 (Fla. 1st DCA 2008) (quoting *Roessler v. Novak,* 858 So.2d 1158, 1161 (Fla. 2d

DCA 2003)). To show apparent agency, a plaintiff must establish "(a) a representation by the purported principal; (b) a reliance on that representation by a third party; and (c) a change in position by the third party in reliance on the representation." *Jones*, 923 So. 2d at 1247 (quoting *Roessler v. Novak*, 858 So. 2d at 1162). Apparent agency is not determined by the representations of the purported agent or the subjective belief of the person interacting with the agent – it is based solely on the actions of the principal. *Fla. State Oriental Med. Ass'n v. Slepin*, 971 So. 2d 141, 145 (Fla. 1st DCA 2007).

It follows from the parties' dispute about the Hospital's control over emergency physicians that Appellants' apparent agency claim also should have survived summary judgment. *See Jones*, 923 So. 2d at 1247 (noting the issue "of a health care professional's apparent authority to act as a hospital's agent is a question of fact best left to the jury"). In addition to the Agreement-related right of control evidence discussed above, Appellants put forth evidence of SRMC seeking out Baptist Hospital for a patient transfer (and Gradia's husband agreeing to her transfer) expressly because of its capabilities *as a facility* to provide the high-level care that Gradia's condition required. The emergency department physician at the Hospital who received and treated Gradia executed a "receiving facility" form confirming that the Hospital "has the capability for the treatment of this patient (including adequate equipment and medical personnel) and has agreed to accept transfer and provide appropriate medical treatment." Gradia herself was unconscious and had no understanding or input into the facility- or physician-assignment decisions made for her. And although Baptist had adopted a consent form to inform patients that emergency department physicians were independent contractors, this form wasn't provided to or signed by Gradia or her family prior to her treatment. *See id.* at 1247–48 (reversing summary judgment on an apparent agency claim where the patient had not chosen the independent-contractor anesthesiologist or certified nurse anesthetist and additional factors indicated that the hospital controlled their work). For these reasons, we reverse the summary judgment order as to Appellants' apparent agency claim.

B.

Finally, we affirm as to Appellants' third claim because chapter 395, Florida Statutes, and its regulations do not impose a nondelegable duty of care upon hospitals to provide non-negligent services. *See id.* at 1249 (declining to find a nondelegable duty where a hospital used an independent contractor physician); *Shands Teaching Hosp. & Clinic Inc.*, 863 So. 2d at 349 (noting that hospitals are not liable for the negligence of physicians who work there as independent contractors); *see also Tabraue*, 272 So. 3d at 473 (concluding that chapter 395 does not provide hospitals with a nondelegable duty of care to patients).

III.

We AFFIRM in part and REVERSE in part the order granting summary judgment and REMAND for further proceedings consistent with this opinion.

ROWE, C.J., and LEWIS, J., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

C. Phil Hall, of Phil Hall, P.A., Pensacola, and Brent F. Bradley, of Walborsky & Bradley, PLLC, Pensacola, for Appellants.

Thomas F. Gonzalez, Terrie L. Didier, and Jena M. Wise, of Beggs & Lane R.L.L.P., Pensacola, for Appellee.